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Regarding Problematic Issues on Legal Regulation of the Institute of Covert Investigative (Detective) Actions in Criminal Proceedings

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Legal regulation of the institute of covert investigative (detective) actions in criminal proceedings is considered. Scientific research to settle problematic issues associated with inconsistencies of the law of Ukraine concerning this subject is explored. The procedure for conducting criminal proceedings with the usage of simulation tools of confidentiality and privacy of information is examined. The participation of the investigating magistrate and the prosecutor while conducting covert investigative detective actions in criminal proceedings is analyzed.

Keywords: covert investigative (detective) action, criminal proceedings, judicial control, investigating magistrate

The Criminal Procedure Code of Ukraine (hereinafter, the CPC), adopted in 2012, coined a lot of innovations into our legal system including new kinds of investigative activities referred to as the covert investigative (detective) actions. The proposed institute changed the established notions and procedures regarding implementation of these investigative (detective) actions in criminal proceedings. Therefore, today the determination of specialties of the mechanism to carry out covert investigative (detective) actions and the legal advantages and weaknesses of its legal regulation in criminal proceedings is quite important.

The institute of covert investigative (detective) actions often draws the attention of national and foreign researchers. However, the subject of scientific research is mostly some components of this institute but not the latter as a whole. For instance, I. Brazhnik examines the role of the investigator while conducting covert investigative (detective) actions; the legal nature of

covert investigative (detective) actions are explored in the works of S. Kyrpa; O. Kerevych analyzes the organizational features of covert investigative (detective) actions; R. Safroniak considers surveillance during covert investigative (detective) actions. Some researchers, e.g., M. Stashchak, V. Uvarov, S. Savytska, D. Nykyforchuk explore problematic issues related to covert investigative (detective) actions. Some attention has also been paid to this subject by such scholars as V. Tertyshnyk, M. Shumylo, V. Shevchuk, L. Udalova, M. Mykhailov, B. Sholudko, F. Shymansky, V. Farynnyk, and others.

The purpose of this article is to investigate and analyze problems related to the legal settlement of the procedure of conducting a covert investigative (detective) action and the preparation of substantiated recommendations for improving the current legislation of Ukraine concerning the relevant subject.

In S. Ozhegov's dictionary the notion 'covert' is defined as something which is unknown to others, not

evident, and secret [Ozhegov, 1987: 323]. The notion 'covert' was not familiar and acceptable to the ideology of the criminal process in 1961, so the CPC of 1961 did not use it. In contrast, criminal procedures were associated with the principles of transparency and openness. Therefore, the law at that time did not consider covert investigative (detective) actions as a form of investigative activities. Such 'covert activities' were regulated by the Law of Ukraine 'On Operational-Investigative Activities'.

Nowadays, lawmakers interpret covert investigative (detective) actions as kinds of investigative (detective) actions during which information about the fact of their execution and the methods thereof are not subject to disclosure, except as provided by the CPC (Article 246).

It should be noted that the practice of most foreign states in the sphere of legal regulation of the pre-trial investigation of crimes indicates that the usage of covert methods for obtaining information regarding crimes and the people who have committed them is no longer being considered as that which reflects the level of democracy in a country. Instead, the transparency of their legal regulation and implementation, the availability of control mechanisms of such proceedings as determined by law makes them an effective tool for the law enforcement activities of a democratic state. Therefore, the legal regulation of covert investigative (detective) actions by the CPC of Ukraine aims at strengthening law enforcement functions of the state and protecting the rights and freedoms of individuals, interests of society and the state from various unlawful encroachments.

In the same manner as B. Sholudko, we consider that the detailed legal regulation of each covert investigative (detective) action determined by the law; the establishment of procedural guidance; the combination of public and covert methods for obtaining information in the system of criminal proceedings while simultaneously strengthening the constitutional guarantees of the rights and freedoms of a person has to become an effective tool for counteracting crime [Sholudko].

Normative regulations and clear definitions of the types of covert investigative activities are also very important, since they are almost always associated with intrusions regarding privacy, restrictions of the constitutional rights of a person to privacy of communication, inviolability of residence, etc., while he/she is not aware of such interference or restriction of their rights. Therefore, Chapter 21 of the CPC provides a comprehensive list of covert investigative (detective) actions, such as: audio and video surveillance of a person (Article 260); arrest of correspondence (Article 261); inspection and seizure of correspondence (Article 262); retrieval of information from transport telecommunication networks (Article 263); retrieval of information from electronic information systems (Article 264); inspection of publicly inaccessible places, dwellings or other property (Article 267); determination of the location of radio-electronic equipment (Article 268); surveillance of a person, thing or place (Article 269); audio and video surveillance of a place (Article 270); control over the committing of a crime (Article 271); and performance of a special task to disclose the criminal activities of an organized group or a criminal organization (Article 272).

In Chapter 21 of the CPC, legislators foresee some exclusivity of such covert investigative (detective) actions stressing the fact that their implementation is only possible if information about the crime and the

person who committed that crime cannot be obtained by other means (Part 2 of Article 246 of the CPC).

Taking into account the fact that covert investigative (detective) actions can restrict the constitutional rights and freedoms of citizens in criminal proceedings, the legislators put the liability to control the observance of human rights and freedoms of citizens on an investigating magistrate who decides on the possibility of conducting a covert investigative (detective) action [Gusarov, 2013: 10].

The increased attention of legislators to this procedural institute and to the guarantees of protection of the constitutional rights and freedoms of a person is also evidenced by the fact that only the head of the appellate court can grant permission to conduct a covert investigative (detective) action. Such permission can also be granted by another judge as determined by the head of the court whose territorial jurisdiction covers the body of the pre-trial investigation carrying out the criminal proceedings (Article 247 of the CPC).

In addition, important measures to guarantee the rights and lawful interests of a person are the next mechanisms provided by the law: recording of the course and results of covert investigative (detective) actions (Article 252); a duty to inform the people to whom the covert investigative (detective) actions were conducted (Article 253); measures to protect the information obtained as a result of covert investigative (detective) actions (Article 254); measures to protect information that is not used in criminal proceedings (Article 255 of the CPC); and others.

For instance, Article 252 of the CPC determines the order of the recording of the course and results of covert investigative (detective) actions. In particular, it stipulates that the recording of the course and results of covert investigative (detective) actions should comply with the general rules of the recording of criminal proceedings envisaged by this Code. In view of the results of such a covert investigative (detective) action one draws up protocols to be, if necessary, attached by annexes. Therefore, the procedure to conduct a covert investigative (detective) action becomes easier, and that consequently facilitates the usage of documents drawn up on the results of covert investigative (detective) actions (which differ from the documents drawn up after operational-investigative activities). According to V. Farynnyk, this means that a covert investigative (detective) action becomes a routine procedural action and can fully be used along with familiar investigative actions [Farynnyk, 2012: 111-112].

However, together with legislative requirements and guarantees of protection of the rights and interests of an individual in criminal proceedings while applying the institute of covert investigative (detective) actions as foreseen by the CPC, one should point out its inconsistencies and drawbacks which, in our opinion, need to be amended or corrected.

For example, Part 5 of Article 249 of the CPC provides the prosecutor's obligation to make a decision on the termination of further implementation of a covert investigative (detective) action if it is no longer necessary. However, in our opinion, by stipulating only such a duty of the prosecutor in the CPC, the legislators have not fully protected the rights of people who were under the covert investigative (detective) actions [Kyrpa, 2013: 218]. We believe that in this case there is no judicial control over the implementation of such activities during a covert investigative (detective) action. For



instance, there are no guarantees of termination of further intrusions into the private communications of a person after the results of the covert investigative (detective) action have been achieved but the court ruling of the investigating magistrate is still valid.

Therefore, we propose that the prosecutor is obliged with the duty to inform the investigating magistrate, who has issued permission to carry out such a covert investigative (detective) action, about their decision to terminate this investigative action by making the appropriate amendments to Part 5 of Article 249 of the CPC. Thus, the wording of this regulation should be formulated as follows: "The prosecutor is obliged to make a decision on the termination of the further implementation of a covert investigative (detective) action if it is no longer necessary, and to report on their decision to the investigating magistrate who issued permission for its implementation".

In our opinion, this gives opportunity to fully guarantee the rights and legally protected interests of an individual during criminal proceedings in the above-mentioned cases.


Considering the institute of covert investigative (detective) actions, one should note that the covert investigative (detective) actions are carried out under the provisions of the CPC but, in some cases (within operational-investigative activities), they could be executed in accordance with the regulations of the Law of Ukraine 'On Operational-Investigative Activities' (hereinafter, the Law). In analyzing the provisions of this Law, it is worth pointing out the differences existing in the legislative regulation of the court rulings of the investigating magistrate. Consequently, the CPC does not provide anybody with the right to contest the court rulings of the investigating magistrate of the appellate court on permission or refusal to grant permission for a covert investigative (detective) action. Though, pursuant to Item 10 of Part 3 of Article 14 of the Law, the prosecutor may lodge a protest against an illegal court ruling permitting or refusing to carry out operational investigative actions. Such a protest terminates the conducting of the operational-investigative activities. The current criminal procedural legislation does not provide mechanisms for considering such protests, and the right to give or refuse to give permissions for a covert investigative (detective) action is granted not to the judge but to the investigating magistrate who controls the observance of the rights and interests of people in the pre-trial investigation [Kerevych, 2012: 142].

Therefore, we propose to exclude the above-mentioned provision of the Law in order to avoid discrepancies between the rules of the Law and those of the CPC.

It is interesting to study the provisions of Article 76 of the CPC in the context of the issue on granting or refusing to grant permission for a covert investigative (detective) action in criminal proceedings by the investigating magistrate. This provision of the CPC foresees the inadmissibility of a second participation of a judge in criminal proceedings. In particular, in accordance with Part 1 of Article 76 of the CPC, a judge who has participated in criminal proceedings during the pre-trial investigation has no right to participate in the same proceedings in the court of the first instance, as well as in the appellate or cassation court. There is a question concerning the procedure to implement the above-mentioned CPC provision as all the record keeping on the conduct of a covert investigative (detective) action is secretly carried out. Therefore, the court ruling of the

investigating magistrate on granting or refusing to grant permission for a covert investigative (detective) action would not be attached to the materials of the criminal proceedings. In our opinion, this issue should be solved by the head of the court who is entrusted with the functions of chief administrator of the judicial institution. His primary duties also include the organization of the process of recording such kinds of secret information in accordance with the rules of the applicable law. This will further facilitate compliance with CPC guarantees and requirements regarding the impossibility of a second participation of the investigating magistrate in criminal proceedings during the pre-trial investigation. We believe that, according to the same Article, the judge, who gave permission to conduct operational investigative activities on the basis of Article 8 of the Law of Ukraine 'On Operational-Investigative Activities', also has no right to participate in the consideration of such materials in the courts of the relevant instances. However, legislators do not expressly note this fact.

So, by grounding on the above-mentioned facts, we can make the following conclusions and generalizations.

Of course, the new CPC of Ukraine, in particular, its Chapter 21 'Covert Investigative (Detective) Actions' is not perfect. However, the current criminal legislation concerning this issue will often be improved and subjected to proper criticism. Law enforcement activities regarding covert investigative (detective) actions has become a litmus test for indicating the advantages and disadvantages of this procedural institute and its place in the system of investigative (detective) actions. This allows for the creation of the conditions under which the number of cases of abuse of such investigative (detective) actions by the bodies of pre-trial investigation would be significantly reduced. This also helps to ensure the proper legislative level of legitimacy, the rights and legitimate interests of people during a covert investigative (detective) action in the pre-trial investigation in criminal proceedings. 

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